

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

LARRY MAGAR,)
)
Petitioner,)
vs.) NO. CIV-06-138-HE
)
DAVID PARKER, Warden,¹)
)
Respondent.)

ORDER

Petitioner Larry Magar, a state prisoner appearing pro se, instituted this action pursuant to 28 U.S.C. § 2241 seeking a writ of habeas corpus. In his petition Mr. Gonzales claims his constitutional rights were violated in conjunction with a disciplinary proceeding conducted at Great Plains Correctional Facility. Consistent with 28 U.S.C. §636(b)(1)(B), the matter was referred to Magistrate Judge Gary M. Purcell, who has recommended that a motion to stay proceedings filed by the petitioner be denied.

The petitioner requested a stay to permit him to exhaust the available state remedies provided by a recently enacted statute, 57 Okla. Stat. § 564.1. That statute has a ninety day limitation period for filing a petition for review of a final Oklahoma Department of Corrections' disciplinary decision, which, the magistrate judge found, ran as to the petitioner's claims on December 21, 2005. The magistrate judge concluded it would be futile to require the petitioner to exhaust the judicial review process because the

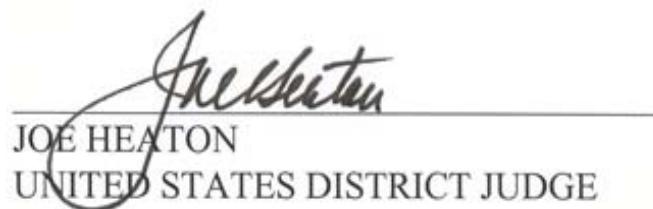
¹*The magistrate judge substituted David Parker, the Warden of the James Crabtree Correctional Center where the petitioner is incarcerated, as the respondent. See Rule 2(a), Rules Governing § 2254 cases.*

state court would find his claims were procedurally barred. The state court's reliance on the statutory time limitation imposed by § 564.1 would, Magistrate Judge Purcell determined, be an independent and adequate state law ground for the state court's decision. Therefore, he recommended that petitioner's due process claims be deemed exhausted but procedurally barred, unless he can show cause for his procedural default and resulting prejudice or that a failure to review his claims will result in a fundamental miscarriage of justice.

The petitioner has objected to the Report and Recommendation and the court, having given his arguments de novo review, concurs with Magistrate Judge Purcell's analysis and adopts his Report and Recommendation. Accordingly, the petitioner's motion to stay [Doc. #9] is **DENIED** and the matter is returned to the magistrate judge to afford the petitioner the opportunity to demonstrate why his claims should not be denied as procedurally barred.

IT IS SO ORDERED.

Dated this 20th day of June, 2006.



Joe Heaton
JOE HEATON
UNITED STATES DISTRICT JUDGE